

were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them. Perhaps timely consular notice would not have changed anything for Gutierrez; perhaps the interpreter's skills, despite his perjury, were sound. These are issues on which an evidentiary hearing needs to be held.⁶

Justices Ron Parraguirre and James Hardesty dissented. They believed that Gutierrez's post-conviction petition for habeas corpus was procedurally defaulted and that he failed to show prejudice from lack of consular notification and from the interpreter's mistranslations.⁷

STATE JURISDICTION AND IMMUNITIES

Tenth Circuit Affirms Rwanda's President's Head-of-State Immunity

In October 2012, the U.S. Court of Appeals for the Tenth Circuit affirmed a decision by the U.S. District Court for the Western District of Oklahoma¹ dismissing a suit against Paul Kagame, the current president of Rwanda, on the basis of head-of-state immunity.² The wives of the former presidents of Rwanda and Burundi sued Kagame. Both of their husbands were killed when their plane was shot down by surface-to-air missiles in April 1994, an event triggering the 1994 Rwanda genocide. The plaintiffs alleged that Kagame ordered the attack on the plane.

The United States filed a suggestion of immunity in the district court and an amicus curie brief in the court of appeals. As summarized by the court of appeals,

During the pendency of this action in the district court, the United States, at the request of the Rwandan Government, submitted a "Suggestion of Immunity" on behalf of President Kagame. Paragraph one states:

The United States has an interest in this action because the . . . Defendant, President Kagame, is the sitting head of state of a foreign state, thus raising the question of President Kagame's immunity from the court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. . . . The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Kagame's immunity from this suit while in office.

In a published opinion, the district court accurately measured the case, deferred to the United States Suggestion of Immunity, and dismissed the action against President Kagame.³

⁶ *Id.* at *12–13.

⁷ *Id.* at *13–16 (Parraguirre & Hardesty, JJ., dissenting).

¹ *Habyarimana v. Kagame*, 821 F.Supp.2d 1244 (W.D. Okla. 2011).

² *Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012).

³ *Id.* at 1031 (citing district court opinion).

The court of appeals also accepted the U.S. position calling for head-of-state immunity and affirmed the district court's dismissal of the widows' suit.

In the words of Judge Wisdom: "The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. Moreover, they have done so with no further review of the executive's determination." *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974) (Wisdom, J.). . . . [T]he [Foreign Sovereign Immunities Act] does not alter common law precedents as they bear upon "the immunity of individual officials." . . . The FSIA does not affect the "State Department's [historical] role in determinations regarding individual official immunity." And that role is well established, despite the widows' contrary arguments.

Simply stated, "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—"as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943); *accord* *Ye v. Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("[A] determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."⁴)

While it upheld Kagame's immunity as Rwanda's current president, the court also noted the limitations on head-of-state immunity identified in the U.S. Suggestion of Immunity.

Paragraph seven of the Suggestion of Immunity observes that "[a]fter a head of state leaves office, however, that individual generally retains residual immunity only for acts taken in [an official capacity as head of state] and not for alleged acts predating the individual's tenure in office."⁵

Second Circuit Rejects Sovereign Immunity Claim, Upholds Discovery Against Argentina's Banks

In August 2012, the U.S. Court of Appeals for the Second Circuit affirmed a lower court's order directing extraterritorial asset discovery against two nonparty banks¹ to aid in enforcing judgments stemming from Argentina's default on its external debt.² In an opinion by Judge John Walker, the court rejected Argentina's argument that the discovery subpoenas violated Argentina's sovereign immunity, concluding

that because the district court ordered only discovery, not the attachment of sovereign property, and because that discovery is directed at third-party banks, Argentina's sovereign immunity is not affected.³

⁴ *Id.* at 1032 (footnote and citations omitted).

⁵ *Id.* at 1032 n.5.

¹ Bank of America and Banco de la Nación Argentina.

² *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012).

³ *Id.* at 202.